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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNANIE ABANA NARCISCO,

Defendant and Appellant.

B206155

(Los Angeles County  
Super. Ct. No. BA321530)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Craig E. Veals, Judge. Affirmed.

Robert M. Sweet, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, David A. Cook and  
Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant, Ernanie Abana Narciso, appeals from the judgment entered following his conviction, by jury trial, for possession of cocaine (Health & Saf. Code, § 11350). Imposition of sentence was suspended and Narciso was put on probation for three years.

The judgment is affirmed.

### **BACKGROUND**

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

On April 21, 2007, Detective Antonio Lee was working off-duty as a security guard for the Pantages Theater. Lee usually worked with the Los Angeles Police Department's Mental Evaluation Unit. Between 1:00 and 2:00 p.m., defendant Narciso tried to enter the theatre without a ticket and was escorted out. At about 3:00 or 3:30 p.m., Lee saw Narciso sprawled on the sidewalk with his head next to a car tire.

Lee put Narciso into a chair and handcuffed him. When asked for his name, Narciso said he had been known as Jesus Christ since he was a child. Asked when he had last eaten, Narciso said he drank blood and the semen of virgins. When Lee asked what Narciso had done the night before, Narciso said he had taken "meth." Asked if he had ever been to a mental institution, Narciso said he had been given a lethal injection.

Narciso had a backpack with him. Lee saw many prescription bottles inside the backpack, some of which had Narciso's name on them. Lee called the police so that Narciso's mental status could be evaluated and the contents of his backpack checked.

Officers Ruben Vasquez and Ivana Gallegos responded to the call and took Narciso into custody. They patted him down for weapons and transported him to the Hollywood Station. There Narciso was put into a holding tank. The holding tank was a 10 by 12 foot room with a clear glass window. The officers patted Narciso down again and had him empty his pockets. Gallegos made sure the holding tank was clear of contraband. Gallegos then went into a room directly across from the holding tank and monitored Narciso. At one point, she saw him reach down toward his groin area and

move his arm. Gallegos walked over to the holding tank and saw that Narciso was holding a plastic baggie in his left hand.

When Gallegos began to unlock the holding tank door, Narciso put his left hand behind his back. Gallegos entered the tank and asked to see what he had. Narciso opened his left hand, revealing a baggie containing a cocaine-like residue. When Gallegos asked where the contents of the baggie were, Narciso opened his right hand and showed her an off-white powder which was later determined to be cocaine.

Narciso was arrested at that point and Vasquez searched the backpack. He found a plastic bottle of the kind used to hold prescription drugs. But on the outside this bottle said “Grand Daddy Purple” and inside there was marijuana in plastic wrapping. There was another piece of plastic wrapping in the backpack which contained a baggie. Inside the baggie was a white powdery substance which turned out to be cocaine.

Vasquez gave Narciso the *Miranda*<sup>1</sup> advisements, which Narciso said he understood. Asked if he would speak to Vasquez, Narciso said, “Yes, it doesn’t matter because corporate America let’s [sic] me.” Vasquez did not ask Narciso what that meant because Vasquez “just thought he was being political.” Vasquez described Narciso’s “corporate America” remark as “unusual. . . . [b]ut I’ve had other people make little comments after answering yes to [that] question.” Narciso said he had bought the cocaine for \$50 from a man, although he couldn’t remember where. Narciso also said he bought the cocaine “mostly for weekend use and for sexual pleasure” because it gave him “a better orgasm.” Vasquez testified Narciso did not seem disoriented during their conversation.

Narciso did not testify or present any evidence.

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<sup>1</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602].

## CONTENTIONS

1. Narciso's statements to Officer Vasquez should have been excluded because they were made in violation of *Miranda*.
2. The prosecutor committed misconduct during closing argument by commenting on Narciso's failure to testify.

## DISCUSSION

1. *There was no Miranda violation.*

Narciso contends the trial court erred by admitting into evidence the statements he made to Officer Vasquez because his purported *Miranda* waiver was invalid. Narciso argues he was obviously mentally ill and, therefore, could not have knowingly and intelligently waived his rights. This claim is meritless.

- a. *Legal principles.*

A “[*Miranda*] waiver must be knowingly and intelligently made, meaning that the defendant must have been capable of freely and rationally choosing to waive his or her rights and speak with the officers.” (*People v. Rundle* (2008) 43 Cal.4th 76, 114, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “It is now settled that both the validity of a defendant’s waiver of his constitutional rights and the voluntariness of his resulting confession must be shown by a preponderance of the evidence.” (*People v. Clark* (1993) 5 Cal.4th 950, 987, fn. 12, disapproved on another ground in *People v. Doolin, supra*, at p. 421, fn. 22.) “ ‘Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]’ ” (*People v. Clark, supra*, at p. 986.)

“On appeal, we review independently the trial court’s legal determinations of whether a defendant’s statements were voluntary [citation], whether his *Miranda* waivers were knowingly, intelligently, and voluntarily made [citation], and whether his later actions constituted an invocation of his right to silence [citation]. We evaluate the trial court’s factual findings regarding the circumstances surrounding the defendant’s statements and waivers, and ‘ “accept the trial court’s resolution of disputed facts and

inferences, and its evaluations of credibility, if supported by substantial evidence.” ’ ’  
(*People v. Rundle, supra*, 43 Cal.4th at p. 115.)

b. *Background.*

At a pretrial hearing to decide the admissibility of Narciso’s statements, the trial court heard testimony from Detective Lee and Officer Vasquez.

Lee testified that, in answer to his questions, Narciso identified himself as Jesus Christ, said God was telling him to do things, and remarked: “I no longer eat solid food, I only now drink blood and the semen of virgins.” When Lee asked if he had ever been in a mental institution, Narciso said, “They tried to give me a lethal injection, a lethal cocktail.” Because Narciso seemed to be disoriented, Lee called the Mental Evaluation Unit “so that a clinician could evaluate” him.

Vasquez testified he advised Narciso of each of his *Miranda* rights, and asked if he understood each right. Narciso said he did. Vasquez then asked if he wanted to talk about what happened, and Narciso replied, “Yes, it doesn’t matter because corporate America lets [me].” Vasquez asked where he had purchased the cocaine and Narciso said he had bought each bag for \$50 from a man, “[but he] didn’t remember if he met [the man] at a bar or on the street.” Narciso said he bought the cocaine for sexual pleasure and that he typically used it on weekends. Vasquez testified that during this conversation Narciso was oriented to time and place, that he appeared to understand Vasquez’s questions and responded to them coherently and appropriately. He maintained eye contact and waited for Vasquez to stop speaking before he spoke. There was nothing leading Vasquez to believe Narciso had not been able to understand the *Miranda* advisements. Vasquez characterized Narciso as having made “unusual statements, but not acting bizarre.”

The trial court ruled Narciso’s statements could be admitted. Although Narciso had been acting irrationally before Officers Vasquez and Gallegos arrived on the scene, he did not behave that way thereafter. The trial court concluded that, during Vasquez’s questioning, Narciso was coherent and responsive: “He explained that he had the contraband on him, where he got it, what he used it for. He wasn’t talking in religious

tones or in a way that would indicate some split from reality or some mental dysfunction on his part. [¶] So what am I left with here but to look at the immediate circumstances?” “The . . . burden of proof is preponderance of the evidence. And if you look at what actually immediately led up to his making the statements and the observation that there was nothing that was strange or bizarre or unusual about his contact [i.e., with Vasquez and Gallegos], even though he originally came to . . . the attention of the police because of some purportedly strange behavior, I don’t think that that would necessarily vitiate his ultimate . . . statements made to the police that seemed to be responsive to what the police were questioning him about . . . .”

c. *Discussion.*

Narciso questions the validity of his *Miranda* waiver “less than an hour after he had been taken into custody for mental evaluation following his irrational and self-endangering behavior at the Pantages Theater,” He argues “it does not logically follow that [he] could regain his mental competence” so soon after “Lee’s determination that [his] mental competence was in question.”

Contrary to the implication there had been a determination by Lee that Narciso was mentally incompetent, the evidence showed only that Lee had a question about Narciso’s competence. The evidence also showed that, by the time Vasquez questioned Narciso, he was responsive and coherent. Hence there was no evidence that, at the time they were given, Narciso did not understand the *Miranda* advisements or could not voluntarily waive them.

Narciso’s reliance on *People v. Hildabrandt* (1966) 244 Cal.App.2d 423, is misplaced. The defendant there testified about his police interrogation, and the court of appeal concluded the evidence showed the defendant had “steadfastly refused to sign anything which he might recognize as incriminating, yet patently he did not realize his oral confession might subsequently be used against him,” (*id.* at p. 431) and that it appeared the defendant “was unaware that he had no duty to respond to police questioning or that he was entitled to have an attorney present” (*id.* at p. 429). There was no such evidence in the case at bar.

In any event, even assuming *arguendo* Narciso's police statement violated *Miranda*, the error would have been harmless. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246] [improper admission of a confession is subject to harmless error analysis]; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510 [accord].) Narciso asserts his statements constituted a critical part of the case, without which the prosecution would have had to rely "on one officer's testimony that she saw white powder in appellant's hand and took it from him as he offered it."

But Gallegos's testimony by itself would have been more than ample to convict Narciso. "The essential elements of possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.' " (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.) "[M]ere possession of narcotics constitutes substantial evidence that the possessor of the narcotic knew of its nature." (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 331.) Narciso is forgetting there was more cocaine in his backpack, which also contained a second illegal drug, marijuana. Evidence showed that both baggies of cocaine contained usable amounts. Narciso's knowledge that cocaine was illegal could have been inferred from the fact he tried to hide it from Gallegos.

We conclude there was no *Miranda* error in this case, but that if there had been it would have been harmless.

2. *There was no Griffin error.*

Narciso contends that during closing argument the prosecutor commented on his failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229].) This claim is meritless.

"*Griffin* forbids argument that focuses the jury's attention directly on an accused's failure to testify and urges the jury to view that failure as evidence of guilt." (*People v. Avena* (1996) 13 Cal.4th 394, 443.) "A prosecutor may not directly or indirectly comment on a defendant's failure to testify in his or her own defense. [Citation.] But the prosecutor may comment on the state of the evidence, including the failure of the defense

to introduce material evidence or to call witnesses.” (*People v. Mincey* (1992) 2 Cal.4th 408, 446; see, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 756 [no *Griffin* violation where “prosecutor’s comments were directed to the general failure of the defense to provide an innocent explanation as to why defendant was armed . . . at the time of the robberies”].)

During closing argument, defense counsel argued Narciso had been experiencing a mental breakdown during these events and, therefore, there was a reasonable doubt whether he had been aware of either the cocaine’s presence or that it was a controlled substance. Defense counsel also argued Narciso might not have known what was in his backpack, or that the backpack might not even have belonged to him.

The prosecutor told the jury Narciso was not having a mental breakdown, he was just high on drugs.

With regard to the cocaine found in Narciso’s backpack, the prosecutor argued: “And there’s no reason to believe that any of those other items in the backpack were not belonged to [*sic*] the defendant. If there was anything exculpatory in this backpack, believe me the defense has the same power to bring the backpack to the court. And they didn’t do that.” “There was an issue as to what exactly was in that backpack. . . . If there was anything exculpatory as if it was someone else’s I.D. or items other than drugs, the defense has the ability to bring it here to court just as easily as I do. And if there was anything to help the defendant, you would certainly hear about it here in court, but you didn’t hear about it.”

Regarding the defense theory that Narciso was having a mental breakdown, the prosecutor argued: “[Y]ou have no evidence that the defendant had any type of mental issues independent of whatever issues he was having that day. [¶] You have no evidence that he has this mental disorder that causes him not to understand his actions. There’s no evidence of that. That’s just speculation on the part of the defense in this case. If there were witnesses that could corroborate that, they should have come to court.”



The prosecutor here did no more than comment on Narciso's failure to present logical witnesses and evidence. There was no reference, express or implied, to Narciso's failure to testify. "A prosecutor is permitted . . . to comment on a defendant's failure to introduce material evidence or call logical witnesses. [Citation.] By directing the jury's attention to the fact defendant never presented evidence that he was somewhere else when the crime was committed, the prosecutor did no more than emphasize defendant's failure to present material evidence. He did not capitalize on the fact defendant failed to testify." (*People v. Brown* (2003) 31 Cal.4th 518, 554.)

There was no *Griffin* error in this case.

#### **DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.